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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 96

DISTRICT OF COLUMBIA, PETITIONER,
v.
WILLIAM H. COLTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR THE DISTRICT OF COLUMBIA

Opinion Below

No opinion was rendered by the Police Court. The opinion of the Court of Appeals (R. 8, 15) is reported in 38 F. (2d) 535.

Jurisdiction

The judgment of the Court of Appeals was entered on February 4, 1930, (R. 15). The petition for certiorari was filed April 24, 1930, and was granted May 26, 1930. Jurisdiction to issue the writ is conferred by Section 240 (a) cf the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The question at issue is whether in the District of Columbia a defendant who is accused of reckless driving, which may be punished by imprisonment for thirty days, may be tried by the police judge without a jury in spite of the defendant's demand for a jury.

Provision of Constitution and of Statutes

Article III, section 2, clause 3, of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury * * * .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * .

Paragraph 1, of Section 44 of the Code of the District of Columbia, provides as follows:

> That prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

The District of Columbia Traffic Act, 1925 (Act of March 3, 1925, c. 443, 43 Stat. 1119) provides:

> Sec. 4. The second paragraph of section 44 of the District of Columbia Code hereby is amended to read as follows: "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year."
>
> Sec. 6 (e). (Added by the Act of July 3, 1926, c. 739, Sec. 4, 44 Stat. 812, 814). All prosecutions for violations of provisions of this Act, excepting section 11 only thereof, and all amendments to the said Act or regulations authorized and promulgated under the authority of said Act and amendments thereto, shall be in the police court of the District of Columbia by information filed by the corporation counsel of the District of Columbia or any of his assistants: Provided, That nothing herein contained shall deprive any person of the right of trial by jury.
>
> Sec. 9. (Reenacted and, as to paragraphs not here quoted, amended by the Act of July 3, 1926, c. 739, Sec. 5, 44 Stat. 812, 814).

(b) No individual shall operate a motor vehicle over any public highway in the District (1) recklessly; or (2) at a rate of speed greater than is reasonable and proper, having regard to the width of the public highway, the use thereof, and the traffic thereon; or (3) so as to endanger any property or individual; or (4) so as unnecessarily or unreasonably to damage the public highway.

(c) Any individual violating any provision of this section where the offense constitutes reckless driving, shall upon conviction for the first offense, be fined not less than $25 nor more than $100 or imprisoned not less than 10 days nor more than 30 days * * * .

Statement of Facts

An information in the Police Court of the District of Columbia charged the respondent with reckless driving. (R. 2, 3). He requested a trial by jury, which was denied. A trial before the court resulted in his conviction and sentence to thirty days imprisonment. There was sufficient proof to sustain the charge alleged in the information (R. 3-5). No evidence was offered on behalf of the respondent. (R. 5). This judgment was reversed in the Court of Appeals of the District of Columbia upon the ground that the respondent was guaranteed a jury trial by the Constitution. The court conceded that persons accused of merely petty offenses may be denied jury trial without violating the Constitution, but it took the position that reckless driving was an offense at common law and for that reason it was to be classed as a crime in the constitutional sense and therefore one who was accused of reckless driving was entitled to trial by jury.

On May 26, 1930, this Court granted a writ of certiorari.

Specification of Errors to be Urged

The Court of Appeals of the District of Columbia erred:

1. In reversing the judgment of the Police Court of the District of Columbia.

2. In holding that one charged with the offense of "reckless driving" in the District of Columbia is entitled to a trial by jury, under the Constitution of the United States.

3. In holding that the offense of "reckless driving" is a "crime" within the meaning of the Constitution of the United States.

4. In holding that the offense of "reckless driving" is not a "petty offense" as that term has been used by this Court.

Summary of Argument

The respondent had no right to trial by jury in this case unless the Constitution gave him that right.

This Court has declared that Congress may require the trial of petty offenses without a jury, but it has not shown the scope of the term "petty offenses."

Before the Constitution was adopted there were many offenses, both in England and in America, in the trial of which no jury was allowed. These included not only offenses which might be punished by fines but many others in which corporal punishment or imprisonment might be imposed.

The Constitution establishes the right to trial by jury in criminal cases, but there is nothing in the terms

used or in the circumstances attending the adoption of those provisions which shows a requirement of trial by jury more comprehensive than was observed throughout the States when the provisions were adopted.

Decisions of many State Courts support the position that an offense such as is here involved, for which the maximum punishment is a fine of $100 or imprisonment of thirty days, may be tried by summary procedure.

The offense of reckless driving in the District of Columbia, as defined in the Traffic Act, is a municipal offense notwithstanding the fact that the law was enacted by the Congress of the United States. Congress has properly treated reckless driving as a petty offense.

ARGUMENT

I.

The respondent had no right to trial by jury in this case unless the Constitution gave him that right.

This Court has conceded, in cases which will be discussed later in this brief, that Congress may provide for the trial of petty offenses without a jury. It so said before the enactment of the District of Columbia Code. (Act of March 3, 1901, c. 854, 31 Stat. 1189). Section 44 of that Code as amended in 1925 (see p. 3, *supra*) provided that trials in the police court should be without a jury where the Constitution did not give the accused the right to one, unless the fine might be more than three hundred dollars or the imprisonment as punishment might be more than ninety days. Congress thus took the position that the Constitution might

not give the right to trial by jury even to the extent named in the Code. The maximum penalty which the District of Columbia Traffic Act (Sec. 9, p. 3, *supra*) authorized for the offense with which the respondent was charged was a fine of one hundred dollars or imprisonment as punishment for thirty days, a punishment well within the limits fixed by Congress as the points at which it gave the right to a jury whether or not the Constitution gave the right to a trial in that manner. Congress clearly intended that up to those limits any right of the defendant to a jury trial must depend upon the Constitution and not upon act of Congress.

There is nothing in section 6 (e) of the Traffic Act which gave to the respondent any right to trial by jury. That paragraph, which was added by the Act of July 3, 1926, c. 739, Sec. 4, 44 Stat. 812, 814, provides:

> All prosecutions for violations of provisions of this Act, excepting section 11 only thereof, and all amendments to the said Act or regulations authorized and promulgated under the authority of said Act and amendments thereto, shall be in the police court of the District of Columbia by information filed by the corporation counsel of the District of Columbia or any of his assistants: *Provided*, That nothing herein contained shall deprive any person of the right of trial by jury.

The portion of the paragraph down to the proviso was proposed by the Senate Committee on the District of Columbia as an amendment to the bill, which had originated in the House of Representatives. The amendment is explained in Senate Report No. 568 of the 69th Congress, 1st Sess., p. 4, which says:

> Under present procedure in the traffic court, first and second offenses for speeding, first offense for reckless driving, and violations of all regulations, are presented to the court by information filed by the corporation counsel or his assistants, while cases which might involve jury trials, such as third offense speeding, second offense reckless driving, first offense driving without a permit, and first offense leaving after colliding, have been presented by information filed by the United States district attorney. This practice leads to much duplication of work and considerable confusion, owing to the fact that an individual may be brought in for offenses which must be presented to the court by both the United States attorney and the corporation counsel. There seems to be no good reason why all these cases, except for use of a smoke screen (a felony) should not be presented by an assistant to the corporation counsel. As it is at present, there are two sets of attorneys handling almost identical classes of cases. They are all municipal cases and ought to be presented to the courts by the same set of attorneys, under the supervision of the District Commissioners.

The Senate agreed to the amendment (67th Cong. Rec., pt. 9, p. 10184) and conferees representing the two Houses agreed to it. (67th Cong. Rec., pt. 11, p. 11799). Subsequently there was read in the Senate a letter from the Director of Traffic concerning the revocation of permits without jury trial. (pt. 11, p. 12315). Thereupon Senators Blease of South Carolina, and Reed of Missouri, who apparently thought that the proposition then before the Senate involved more than the revocation of permits, urged trial by jury in all cases. (pp. 12315-12317). As a result of this discussion, the Senator in charge of the bill moved that the

Senate disagree with the conference report and request further conference with the representatives of the House of Representatives. (p. 124733). The conferees added to the amendment to section 6 the provision that "nothing herein contained shall deprive any person of the right to trial by jury." (p. 12765). Both Houses agreed to the bill as amended. (pp. 12765, 12895). The managers on behalf of the House of Representatives said (p. 12765) that the provision preserved the constitutional rights of citizens. They might have gone further and said that the proviso made it clear that the change in the manner of presenting cases in the police court, by which the corporation counsel would thereafter present some classes of cases which had theretofore been in charge of the district attorney, would not affect the rights of the defendants to trial by jury. The rights, both constitutional and legislative, to trial by jury which defendants had possessed theretofore were not to be affected by section 6 (e) of the act. But there is nothing to show that those rights were in any way extended by the proviso at the end of the added paragraph.

Under the Traffic Act as amended the respondent had no right to trial by jury on the charge of first offense of reckless driving unless the Constitution gave him a right to such a trial, and the trial court and the Court of Appeals properly so construed the act.

II.

This Court has declared that Congress may require the trial of petty offenses without a jury, but it has not shown the scope of the term "petty offenses."

The necessity of trial by jury was considered in *Callan* v. *Wilson* (1888) 127 U. S. 540, a case which

arose in the District of Columbia. The defendant, who was charged with conspiracy, was tried and convicted in a police court without the participation of a jury, although he had demanded jury trial. This Court said (pp. 549, 555, 557):

> In our opinion the provision [of the Third Article for the trial of "crimes" by jury] is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amentment * * *.
>
> Conceding that there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed within the District, may, under the authority of Congress, be tried by the court and without a jury, we are of opinion that the offense with which the appellant is charged does not belong to that class * * *.
>
> Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority

> of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged.

And in *Schick* v. *United States* (1904) 195 U. S. 65, where the defendant waived trial by jury and agreed to submit the issues to the court, this Court sustained trial by the court. The statute provided a fine of fifty dollars for the offense of knowingly purchasing or receiving for sale any oleomargarine which had not been branded or stamped according to law. The court said (p. 68):

> The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense.
>
> In such a case there is no constitutional requirement of a jury.

The Court then interpreted the word "crimes" in Article III in the light of the common law as set forth by Blackstone and said that

> it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

These two cases require a somewhat careful examination.

In *Callan* v. *Wilson* the defendant was sentenced to pay a fine of twenty-five dollars or undergo imprisonment for thirty days; but that was not the maximum

punishment which might have been imposed. "It is what sentence can be imposed under the law, not what was imposed, that is the material consideration." (*United States* v. *Moreland*, 258 U. S. 433, 441). While no statute dealt with conspiracy directly, Rev. Stat. Dist. Col., Sec. 92, provided that laws which were in force in Maryland on February 27, 1801, should continue in force within the District of Columbia, and conspiracy was a common-law misdemeanor in Maryland (*State* v. *Buchanan* (Md., 1821) 5 Harris & Johnson, 317, 360; and see Bishop on Criminal Law, 9th ed., I, 452; Russell on Crimes, 7th ed., I, p. 10) and, therefore, in the District of Columbia. One who was convicted of that offense could not have been sentenced to the penitentiary (Rev. Stat. Dist. Col., Sec. 1144) but he could have been sentenced to jail (Rev. Stat. Dist. Col., Secs. 1049, 1054); and imprisonment for a common-law misdemeanor was at the discretion of the court and was not limited to one year. (See *United States* v. *Marshall* (1887) 17 D. C. 34; *Palmer* v. *Lenovitz*, 35 App. D. C. 303, 305). The offense was being punished as a common-law offense, for which very serious punishment might have been imposed. The case was, therefore, unlike the one which is now before the Court, for here the offense, which was forbidden by statute, cannot be punished by a larger fine than one hundred dollars or by a longer imprisonment than thirty days. The essential point of similarity, as found by the court below, is simply the fact that reckless driving was also an offense at common law.

It is true that in *Callan* v. *Wilson* the Court referred to the common law as determining whether an offense was of the class or grade which was triable by a jury at common law. It substantially said that the clauses

of the Constitution which provide for trial by jury are to be read in the light of the rule of the common law which requires trial by jury in criminal cases but exempts petty offenses from this requirement. But the Court did not take the position that all offenses must remain for all time as they were at common law. It did not deny that Congress may provide serious punishment for acts which were regarded as innocent a hundred and forty years ago and punish lightly, or not at all, acts which were regarded as serious crimes by our ancestors. Certainly if offenses which were once petty are to be punished severely, a trial by jury must be allowed; and it must be equally true that if Congress decides that an offense shall be given a petty punishment persons who are accused of such acts may be tried as for petty offenses. As the court said in *People* v. *Craig*, 195 N. Y. 190, 197, "It is not the mere name of a crime but the punishment therefor that characterizes it." The decision in *Callan* v. *Wilson* does not deny the power of Congress to erect its own standards as to the seriousness of offenses at the present day, to limit the punishment accordingly, and to order the trial of an offense which it treats as petty by summary procedure.

In *Schick* v. *United States, supra*, the only punishment provided for the offense was a fine of fifty dollars, and the defendant waived trial by jury. The Court decided that such waiver was valid, and said incidentally that the offense was a petty one and therefore Congress might have required trial by the judge alone. Its statements that the Constitution does not require jury trial of petty offenses and that the nature of the offense and the amount of the punishment determine whether the offense is serious or petty, mark the extent of the holding of the Court, for it cannot be sup-

posed that the Court, in the passage already quoted, intended to class all misdemeanors as petty offenses. In referring to the nature of the charge as a factor to be considered the Court may well have meant that the effect of conviction upon the reputation of the defendant may be considered as well as the amount of the fine or the imprisonment; but it did not discuss this point.

The Court has thus conceded that the Constitution does not require trial by jury in the case of petty offenses, but it has not shown just what offenses are to be classed as "petty."

III.

Before the Constitution was adopted there were many offenses, both in England and in America, in the trial for which no jury was allowed. These included not only offenses which might be punished by fines but many others in which corporal punishment or imprisonment might be imposed.

Before the adoption of the Constitution Parliament had enacted a number of statutes for the trial of criminal offenses by justices of the peace without providing for the participation of juries, not only when fines were authorized but also when conviction might be followed by whipping or imprisonment. The statutes thus granting the power of summary conviction are discussed in Blackstone, Commentaries, IV, 280; Paley, Summary Convictions, Introduction; Webb, English Local Government: Parish and County, 419; Jenks, Short History of English Law, Eng. ed., 153, 154; Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 925, 929. Under such statutes, a servant who assaulted his master or overseer (5 Eliz., c.

4, Sec. 21) or a maker of false prophesies for the purpose of disturbing the realm (5 Eliz., c. 15) might be imprisoned for one year; any one who cut growing grain or robbed orchards might be whipped (43 Eliz., c. 7); a silk-winder who embezzled goods committed to him might be whipped or set in the stocks (13 and 14 Car. II, c. 15); any one who maliciously injured trees might be put to hard labor in the house of correction for three months (1 Geo. I, Stat. 2, c. 48; 6 Geo. I, c. 16); men who lurked near the shore in order to aid smugglers might be committed to the house of correction to be whipped and kept at hard labor for not more than a month (9 Geo. II, c. 35, Sec. 18); one who removed rushes which had been planted to preserve sand hills was to be fined for the first offense, but for the second offense might be committed to the house of correction for one year, to be whipped and kept at hard labor (15 Geo. II, c. 33, Sec. 6); and vagabonds might be sentenced to imprisonment for six months, and an incorrigible rogue for two years, with whippings. (17 Geo. II, c. 5).

In the American Colonies and States there were many instances of laws for the trial of criminal offenses which did not provide for the participation of juries except, if at all, on appeal.

Thus, in New Hampshire the laws provided that many offenses were to be tried before one or two justices of the peace and said nothing whatever concerning juries in trials before those justices although the laws carefully provided for juries in trials before other tribunals. If any persons who had been convicted of adultery and sentenced to wear the capital letter A upon their outer garments were at any time found without the letter so worn, "they shall by warrant from a justice of the peace be forthwith apprehended and

ordered to be publicly whipped, not exceeding fifteen stripes." (Act of June 14, 1701, Laws of New Hampshire, compiled by A. S. Batchellor and successors, I, 676). Any Indian, negro or slave who was abroad in the night time after nine o'clock, unless upon an errand for his master, was to be sent by any justice of the peace to the house of correction, to receive the discipline of the house, and where there was no house of correction he was to be openly whipped by the constable, not exceeding ten stripes. (1714, Laws, II, 138). Justices of the peace might send vagrants to the workhouse. (1718, II, 266). Any negro, Indian or mulatto servant breaking a street lamp might be whipped ten stripes for the first offense and twenty stripes for a later offense. (1754, III, 72; see also V, 691). The disorderly celebrating of Guy Fawkes Day might be punished by imprisonment for forty-eight hours (1768, III, 514); and the disorderly celebrating of Christmas, gaming in public places or driving through the public streets of a town faster than five miles an hour, might be punished by imprisonment for forty-eight hours or setting in the stocks for two hours. (1771, III, 564). The laws authorized justices of the peace to impose fines for many offenses. In these trials without jury, if those who were fined did not pay the fine promptly the alternative punishments were often severe. For profanity one might be sentenced to ten days in jail (1747, III, 29; 1791, V, 651; for Sabbath-breaking forty days (1785, V, 75); one who killed deer out of season might be sent to the workhouse for forty days for the first offense and fifty days for every subsequent offense (1740/1, II, 585; see also 1778, IV, 183); one who broke a street lamp and did not pay his fine within six hours after sentence might be punished by imprisonment for six months (1754, III, 72); and

one who spoke against the war with Great Britain might be sentenced to six months imprisonment if he did not pay his fine. (1777, IV, 75). The constitution of 1784, in section 15 of the bill of rights, provided that no one might be deprived of his life, liberty or estate but by the judgment of his peers or the law of the land, there was no other provision for the trial of criminal offenses by jury.

In 1630 the Court of Assistants of Massachusetts Bay, which exercised legislative, executive and judicial powers, ordered that justices of the peace were "in all things to have like power that justices of the peace hath in England for reformation of abuses and punishing of offenders; and that any justice of the peace may imprison an offender, but not inflict any corporal punishment without the presence and consent of some one of the assistants." (Records of the Colony of Massachusetts Bay, Shurtleff, I, 74). The Court itself punished a colonist who had been injuring Indians by sending him to the bilbowes, confiscating his property and sending him back to England. (Same, 75); a servant was whipped for misdemeanor towards his master (p. 81); a man was whipped for shooting at fowl on the Sabbath (p. 82); a man was whipped, had his ears cut off and was fined and banished for speeches against the government and the church of Salem (1631, p. 88); a man for attempted rape, swearing and breaking into a house was sentenced to a whipping of thirty stripes, a year's imprisonment at hard labor and coarse diet, and to wear an iron collar, 1636, p. 177); and other similar punishments were imposed. (1631, pp. 90, 91, 92, 1632, pp. 99, 100, 101). During this period juries are noted only in a civil case (1631, p. 86) and in cases involving murder or manslaughter. (1630, p. 81, 1637,

pp. 202, 203). It was not until four years after the settlement that it was ordered that no trial should pass upon life or banishment but by jury or by the General Court (1634, p. 118; and see p. 312). By Province Laws 1693, c. 9, Acts and Resolves, I, 122, a justice might "punish breakers of the peace, prophaners of the Sabbath, and unlawful gamesters, drunkards, or prophane swearers of cursers, by setting in the stocks, or putting into the cage, not exceeding three hours, or imprisonment twenty-four hours, or by whipping, not exceeding ten stripes, as the case may deserve, and where the offender has not wherewithall to satisfy the law in that case provided." It seems that where the laws provided for fine or alternative corporal punishment it was not always possible for the offender to avoid corporal punishment by paying the fine. (See also, for example, Laws 1705-6, c. 5, Sec. 6, Acts and Resolves, I, 573; Laws 1711-12, c. 6, Sec. 13, I, 679, 681). A justice might try and might fine or punish those who, for example, refused to serve in public office (1720, II, 185; 1731, II, 599; see also 1761, IV, 462; Act of May 8, 1781, c. 10); sold liquor without a license (1711, I, 679, 681) or to Indians (1765, IV, 763—forty shillings or three months); or demanded money when armed or at night time when accompanied by others or built a bonfire within ten perches of any building (1756, III, 997—forty shillings or one month). Persons who led idle or disorderly lives might be committed to the house of correction, to be kept at hard labor until discharged by order of the justice of the peace or by the sessions court (1699, I, 378; 1720, II, 182; 1731, II, 579; 1770, V, 46) or might be sentenced to three hours in the stocks or to ten stripes. (1770, V, 46). The Act of March 26, 1788, c. 21, p. 680, authorized one justice

of the peace to send beggars, fortune-tellers, common drunkards and idle and disorderly persons to the house of correction, to be kept there until discharged by the overseers of the poor. For the second offense of profanity one might be placed in the stocks or whipped. (1731, II, 700). An act of 1777 (V, 626), which authorized a justice of the peace to commit a deserting soldier and notify his commanding officer but did not authorize any fine, stipulated that if the offender were unable to pay such fine the justice might sentence him to thirty-nine lashes for each offense. Two justices might try one who wilfully broke a street lamp and fine him five pounds for the first offense and ten for the second; if he did not pay the fine within six hours he might be imprisoned for six months. (1753, III, 645). Under the same law a negro, Indian or mulatto servant who broke such a lamp might be whipped ten stripes for the first offense and twenty for any later offense. (Compare 1774, V, 301, where the fine was raised to twenty pounds and the trial was transferred to the court of general sessions). By Act of March 15, 1785, c. 33, p. 263, one justice of the peace might try a person accused of larceny provided the treble value of the property stolen did not exceed forty shillings and might sentence the offender to pay a fine of forty shillings or to be imprisoned for twenty days and to make satisfaction. And by Act of Feb. 28, 1787, c. 16, pp. 579, 586, a justice might fine an innkeeper for keeping gaming implements or permitting dancing or suffering any one to drink to excess in his house, and if the fine were not paid might sentence him to a public whipping of fifteen stripes. Several of the above laws were enacted after the state constitution, adopted in 1780, had provided in the Declaration of Rights, Article 12:

> No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

In Rhode Island, Acts of September, 1790, provided for a fine of fifteen pounds to be imposed by a justice of peace upon any one who rode faster than a common traveling pace in the streets or highways within eighty rods of the State House in South Kingston.

In New York prior to 1732 there seems to have been no offense punishable by a justice which might not have been atoned by the payment of a fine except that where a servant sold a commodity during the time of his service, two justices might impose either fine or corporal punishment (1665, Colonial Laws of New York, I, 47) and that if a mayor or two justices of the peace decided that a person was a vagrant they might order his or her transportation to place of birth or out of the province, and in case of a return order retransportation from constable to constable, with lashings on the bare back by each constable. (1721, Same, II, 56). In 1732 there was enacted further legislation (II, 745) which was broadened in 1744 into the provisions that when any person who was charged with any offense under the degree of grand larceny was unable to give bail to appear at the next general sessions, he might be tried and sentenced to corporal punishment, the trial being by three magistrates of the class named

if within the city of New York and by three justices of the peace if elsewhere in the colony. (1744, III, 377, 379). The constitution of 1777 (Art. XLI) provided that "trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." Nevertheless an act of 1785 (c. 40) authorized the mayor, recorder and aldermen of New York City to commit to the house of correction for not more than six months any one whom they might theretofore have sentenced to corporal punishment, and to commit any vagrant or prostitute to the house of correction for a similar term; an act of 1787 (c. 15, Sec. 21) authorized a majority of inspectors at any election to jail for thirty days any person who was guilty of disorderly conduct at any election or used corrupt means to influence any elector; and in 1788 (c. 31) the legislature authorized any justice to commit any disorderly person to the house of correction, at hard labor, for two months or hold him for the next general sessions, which might commit him to the house of correction for six months, with whippings. Such statutes did not deny trial by jury in cases in which it had been used at the time of the adoption of the constitution. A statute similar to that of 1744—by which three justices tried without a jury a man who was accused of petty larceny and was unable to give bail—was sustained in *Murphy* v. *People* (1824) 2 Cow. 815; see also *Duffy* v. *People* (1843) 6 Hill, 75, 78. And in *People ex rel. Murray* v. *Justices* (1878) 74 N. Y. 406, the Court of Appeals sustained a statute under which a defendant charged with assault and battery elected to be tried by such a court, without a jury, was convicted and was sentenced to imprisonment for four months. The statutes, however,

did not give the court jurisdiction to try for an offense where a sentence to imprisonment for more than one year might be imposed. *People ex rel. Cosgriff* v. *Craig* (1909) 195 N. Y. 190.

In Pennsylvania the Body of Laws (1682, Pennsylvania Charters and Laws, 107 et seq.) provided for trial by jury "in criminal matters of life" (p. 117), but it also provided that any servant assaulting or menacing his master or mistress should be punished at the discretion of two justices of the peace, "so it be suitable to the nature of the offense" (p. 113); that for clamorous scolding a justice of the peace should commit the offender to the house of correction for three days (p. 115; see also p. 198) and that profanity and drunkenness should be punished, apparently after hearings before a justice of the peace (see 1683, p. 133), by fines ranging up to ten shillings or, at the discretion of the justice (p. 121), by imprisonment in the house of correction at hard labor ranging up to ten days. (pp. 108, 109, 110). Similar punishments for profanity might be assessed by one justice of the peace under an act of 1702 (Stat. at L. of Pa., II, c. 44). An act of 1767 (VII, c. 552) authorized any justice of the peace of the city of Philadelphia or named adjoining townships, upon due examination and proof, to sentence any disorderly persons or vagabonds without visible means of subsistence to the house of employment to be kept at hard labor for not more than one month. Another act passed on the same day (VII, c. 555) authorized any justice of the peace outside of Philadelphia and of the townships named to impose a similar punishment upon disorderly persons but allowed an appeal to the court of general quarter sessions in such cases. The state constitution of 1776 provided (Declaration

of Rights, Sec. 9) "That in all prosecutions for criminal offenses, a man hath a right to * * * a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty;" and (Frame of Government, Sec. 25) "Trial shall be by jury as heretofore." By acts of 1777 (IX, cc. 737, 739) all laws which were in force on May 14, 1776, were continued in force, and justices of the peace were given the same powers and jurisdiction as they had theretofore possessed.

In Maryland an act of 1638/9 (Maryland Archives, I, 53) authorized the Lieutenant General or any one of the council having commission for the peace to hear and determine as any justice of the peace in England might do the following cases in addition to those in which fines were authorized: drunkenness, punishable by whipping or other corporal punishment; fornication and adultery, public whipping or fine; refusal of servant to perform lawful command, whipping or other correcting at the discretion of the justices. The colony naturally punished the misconduct of slaves by inflicting physical pain rather than by fines. The justices were authorized to try and order whippings for any slave who carried a gun off the lands of his master without license from his master (1704, 26 Archives, 261), who stole or committed any other crime or misdemeanor (1717, 33 Archives, 112), or who harbored other slaves (1748, Maryland Session Laws, 21); while a negro who struck a white man might have one of his ears cropped. (1723, 34 Archives, 732). Any constable might whip, not over thirty-nine lashes, any slave whom he found attending an unlawful meeting, and might do this without proceedings in any court. (1723, 34 Archives, 731). Any person, free or slave,

who navigated a sloop unlawfully carrying tobacco might be given thirty-nine lashes. (1747, Maryland Session Laws, 9; 1753, Session Laws, 2). The Maryland Constitution of 1776 provided in its Declaration of Rights (Sec. 3) "That the inhabitants of Maryland are entitled to the common law of England and the trial by jury according to the course of that law;" (Sec. 19). "That, in all criminal prosecutions, every man hath a right * * * to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty;" and (Sec. 21) "That no free man ought to be * * * deprived of his life, liberty or property but by the judgment of his peers or by the law of the land." And yet the laws of 1780, June session, c. 14, Sec. 77, provided that any free man making a fire in or near a public tobacco warehouse should be fined six hundred pounds of tobacco and any servant or slave so doing should by order of any justice receive on his bare back not more than thirty-nine lashes (see also Sec. 89); by Session Laws, 1785, c. 29, Sec. 5, if any person suffered any servant or slave to kill a wild deer contrary to the act he was to be fined ten pounds, and if any servant or slave killed such wild deer without the knowledge of his master he was to receive not more than thirty-nine lashes at the discretion of the justice of the peace; and by Laws 1787, c. 11, Sec. 16, any justice of the peace of Kent County might commit any disorderly person or idle person without visible means of subsistence to the workhouse for three months. (See also Laws 1787, c. 16, Sec. 16; Laws 1788, c. 14, Secs. 15, 16, 17, c. 15, Secs. 16, 18).

In North Carolina By-Laws 1770, c. 10, Sec. 2, 23 Rec. at 802, if any one were convicted before a justice of the peace of hunting with a gun in the night time

by fire light, the justice might impose a fine and "order such offender to have and receive thirty-nine lashes, on his bare back, well laid on." By-Laws 1777, c. 21, 24 Rec. 33, if a justice found the accused guilty of night hunting he might require the convict to serve as a continental soldier for three years unless he immediately procured an able-bodied and effective substitute to serve for that term. By-Laws 1778, c. 2, 24 Rec. at 158, any one convicted before a justice of the peace of being a vagabond might be sentenced to serve in the continental army, and any one convicted before two justices of harboring a deserter might be sentenced to serve in the continental army for three years if he were able-bodied; and if he were not sufficiently able-bodied to serve as a soldier he might be fined fifty pounds and sentenced to imprisonment for three months. By-Laws 1780, c. 7, 24 Rec. at 325, if two justices of the peace found that any person supported himself for the most part by gaming, they might require security that he would not bet anything whatever for the term of twelve months. And Laws 1784, c. 34, 24 Rec. 597, punished gaming by imprisonment, involuntary servitude and, where necessary, by thirty-nine lashes on the bare back for each offense. (See also Laws 1764, c. 4, 23 Rec. 611). Several of these laws were enacted after the North Carolina Constitution of 1776 had provided in Article 9 of the Declaration of Rights.

> That no free man shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

Volumes 18 and 19 of the Colonial Records of Georgia contain legislation of that colony and state down

to 1800 which authorized trial for offenses without jury. (See Georgia Justice of the Peace, title "Conviction"). Such was the act of Feb. 29, 1764, 18 Rec. 588, for the punishment of vagabonds and other idle and disorderly persons—an act which authorized imprisonment up to three months or whippings up to one hundred stripes. Such was the act of Feb. 21, 1785, 19 Rec., pt. 2, at 424, under which any white person guilty of fast driving in Savannah was to be fined without trial by jury and any slave might be given thirty-nine lashes. Without jury trial fines of five pounds might be imposed on those who damage roads (March 7, 1755, 18 Rec. at 95), sold liquor to Indians without licenses (July 23, 1757, 18 Rec. at 223), built wooden chimneys (March 27, 1759, 18 Rec. 313), took any material from fortifications (April 24, 1760, 18 Rec. at 415), sold liquor to slaves without the consent of their owner (Dec. 24, 1768, 19 Rec., pt. 1, at 79), hunted deer at night by fire light (Sept. 29, 1773, 19 Rec., pt. 1, 288), or who, as church warden, failed to inspect slave owners who attended church and prosecute those who came unarmed (Feb. 27, 1770, 19 Rec., pt. 1, 137).

IV.

Article III and the Sixth Amendment established the right to trial by jury in criminal prosecutions; but there is nothing in the terms used or in the circumstances or discussions attending their adoption which shows a requirement of trial by jury more comprehensive than was observed throughout the States at the time.

The provision for trial by jury first appeared before the Federal Convention when reported by the Committee of Detail on August 6. Article IX, Sec. 4 read:

> The trial of all criminal offenses (except in cases of impeachment) shall be in the State where they shall be committed; and shall be by jury.

On August 28

> Sect. 4 was so amended nem: con: as to read "The trial of all crimes (except in cases of impeachment) shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the Legislature may direct." The object of this amendment was to provide for trial by jury of offenses committed out of any State.

The Committee on Style on September 12 proposed to change the number of the section, to omit the word "then" and to change "the legislature may direct" to "the Congress may by law have directed." Its changes were adopted. On September 15 a motion to secure trial by jury in all civil cases was rejected without dissent. It will be observed that in the Convention there was no discussion of the scope of the provision for trial by jury in criminal cases and that "crimes" and "criminal offenses" were treated as synonymous.

The Federalist (No. 83) discussed trial by jury in civil cases; but its only reference to criminal cases was as follows:

> The friends and adversaries of the plan of the convention if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former

> regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government * * *. I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

Somewhat similar language was used by Dawes in the Massachusetts convention (Elliot's Debates, II, 113) and by Iredell in the North Carolina convention (Elliot, IV, 171; see also 147, 154); but the chief interest of those who considered trial by jury was in securing a jury of the vicinage and in securing jury trial in civil as well as in criminal cases. The scope of the provision for trial by jury in criminal cases was not discussed.

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

It does not appear that in any of the discussions in Congress which preceded its submission to the States

for ratification (see Annals of Congress, I, 435, 450, 464, 703, 707, 756, 759, 760, 778; House Journal, 1st Cong., 64, 79, 85, 89, 106, 115, 116, 121; Senate Journal, 63, 64, 71, 73, 77, 83, 84, 86-88) the term "criminal prosecutions" received any definition.

Both the Third Article of the Constitution and the Sixth Amendment secure the right to a jury in the trial of a criminal case. But there is nothing in the proceedings before the Federal Convention, the state conventions or the First Congress which suggests that the requirement of trial by jury was any more comprehensive than the practice observed throughout the States in 1787, 1788 and 1789.

V.

Decisions of many State courts support the position that an offense such as is here involved, for which the maximum punishment is a fine of one hundred dollars or imprisonment of thirty days, may be tried by summary procedure.

In *State* v. *Parker* (1924) 87 Fla. 181, the defendant was charged, tried, convicted and sentenced to 30 days imprisonment for the violation of an ordinance which provided:

> It shall be unlawful for any person or persons, while under the influence of intoxicating liquor, or while in an intoxicated condition, to drive or operate any automobile or motor vehicle, over and upon the streets of the city of Jacksonville.

Punishment for the first offense was imprisonment of not less than 30 days nor more than 60 days, with increased confinement for the second and third offense.

The provisions of the Florida Constitution pertaining to trial by jury are substantially similar to those in the Federal Constitution. Parker demanded a trial by jury, which was refused, and upon commencing his sentence a petition for habeas corpus was filed. The Supreme Court of the state of Florida in sustaining a judgment of conviction said:

> Sec. 3 of the Declaration of Rights in our Constitution, providing that "The right of trial by jury shall be secure to all, and remain inviolate forever," was never intended to *extend* the right of jury trial, but merely secures it in the cases *in which it was matter of right before the adoption of the Constitution.* Trials in Municipal Courts for infractions of municipal ordinances were conducted generally without juries prior to the adoption of our Constitution, and, therefore, do not fall within the constitutional guarantee; and offenders against such ordinances are not entitled to a jury trial in such courts. (Citing cases.)

The common law may be changed by statute when not forbidden by organic law (*Ruff* v. *Georgia*, S. & F. R. Co., 67 Fla. 224, 64 South. Rep. 782); and when the common law is changed by statute, the subsequent adoption of organic law has relation to existing statutes that change the common law. See *Camp. Phosphate Co.* v. *Anderson*, 48 Fla. 226, 37 South. Rep. 722.

In *Bray* v. *State* (1903) 140 Ala. 172, a defendant was denied a jury in a prosecution for violation of an ordinance which punished failure to pay hack fare. He was convicted and sentenced to six months at hard labor. Trial without jury was sustained.

In *State* v. *Broms* (1918) 139 Minn. 402, the defendant was prosecuted under an ordinance for disorderly

conduct, was convicted and sentenced to hard labor for ninety days. The court held that he was not entitled to a jury trial. In *State* v. *Anderson* (1925) 165 Minn. 150, the court decided that one who was accused of selling intoxicating liquor unlawfully in violation of an ordinance was not entitled to trial by jury. In that case the defendant was sentenced to imprisonment for ninety days.

In *Byers and Davis* v. *Commonwealth* (1862) 42 Pa. St. 89, an act authorized the mayor or police magistrate to try a professional thief or pickpocket who frequented designated places for an unlawful purpose and if he were found guilty to commit him to hard labor in the county jail for not more than ninety days. The defendants were tried without a jury, were convicted, and were sentenced to hard labor in jail for ninety days. The act was sustained.

In *People* v. *Harding* (1921) 189 N. Y. Supp. 657, defendant was tried and convicted in the city court of Buffalo for violation of Section 887, sub-division 4 (e) (vagrancy) of Criminal Procedure. She demanded a trial by jury which was denied. The court in its opinion said:

> As the evidence offered leaves no doubt as to her guilt, the only question left for consideration is whether or not the demand for a trial by jury was properly denied. As the power to punish vagrants under the Code of Criminal Procedure was greatly enlarged by Chapter 502 of the Laws of 1919, and as it is now possible under Section 891a to impose a sentence, not exceeding three years, to a correctional institution, or to a jail, penitentiary, or other penal institution for a period not to exceed one year, it is urged that, as the punishment now

provided is so much more severe than under the old provisions, the former decisions construing this law are no longer applicable, and that the defendant should now be entitled to a jury trial as a matter of right.

The constitutional provision for a jury trial (Article I, Paragraph 2) is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever * * * ".

This section has reference to a trial by a common-law jury of twelve men (*People* v. *Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People* v. *Justices of Court of Special Sessions*, 74 N. Y. 406) and has been in force since 1777. Courts of Special Sessions have existed since 1744 to the present time, but no jury was permitted in these courts until 1824, when the *Legislature* provided for a jury of *six* (*People* v. *Justices of Court of Special Sessions*, 74 N. Y. 406), so that any right that a defendant may have to a jury trial in a court of Special Sessions is statutory, and not constitutional, and hence, in the absence of statutory provisions therefor, the defendant is not entitled to a jury trial as a matter of right.

In the case of *Duffy* v. *The People*, 6 Hill's Rep. 75, the Court of Errors of the State of New York passed upon the constitutionality of an Act passed in 1833 punishing a husband or parent who abandoned his wife or children in the State of New York without adequate support. Duffy was convicted by the court without a trial by jury. The court in sustaining the conviction said (p. 78):

The Constitution does not require an indictment in all criminal cases; or even for all crimes which are infamous in their character. For the

> crime of petit larceny, which was always considered as infamous, is expressly excepted from the section of the 7th Article of the Constitution, which requires an indictment for capital offences, and all infamous crimes. Nor does the Constitution require a trial by jury in every case of a criminal nature. The provision of the Constitution on that subject is, that the trial by jury in all cases in which it had been used at the time of the adoption of the new Constitution, should remain inviolate forever. (Const. Art. 7). A provision substantially in the same form was contained in the former Constitution of this state but the statutes of the colony, previous to the adoption of the old Constitution, and the statutes subsequently thereto, expressly authorized the trial of petit larceny, and offences not infamous in their character, under the degree of grand larceny, without indictment, and without a jury, where the accused neglected to give security to appear at the next Court of General Sessions. (See Colonial Act of 1st Sept. 1744, and 1 Greenl. Laws N. Y. 422; 2 R. L. of 1813, p. 504, 507.) And the first law authorizing a trial by jury in any case, in a Court of Special Sessions, for such offences, was passed subsequent to the adoption of the present Constitution.

In *Bell* v. *State of Nebraska* (1920) 104 Neb. 203, the defendant was charged by an information with the offenses of having in his possession, and of transporting, intoxicating liquor. Nebraska Laws of 1917, Chapter 187, Section 55, provides that magistrates and police courts are vested with jurisdiction to try without a jury violators of this act and all ordinances wherein the penalty does not exceed a fine of $100 or imprisonment for a period of three months. Plaintiff

claimed his right under the Constitution of the State (Article 1, Section 6) which provides that "The right of trial by jury shall remain inviolate" was disregarded. The court said (page 205):

> At that time the misdemeanors now under consideration were not recognized by the common law or by any statute then in existence. New misdemeanors and modes of trial therefor are proper subjects of legislation. The better view seems to be that the legislature acted within its powers in declaring possession and transportation of intoxicating liquors to be misdemeanors, and in providing for the trial of violators of the law before magistrates and police courts without a jury where the penalty does not exceed a fine of $100 or imprisonment for three months. While the decisions of the courts are not in harmony on this question, the conclusion reached is supported by the soundest reason. *Inwood* v. *State*, 42 Ohio St. 186; *Kirkland* v. *State*, 72 Ark. 171; *Van Swartow* v. *Commonwealth*, 24 Penna. Stat. 131; *Tims* v. *State*, 26 Ala. 165; *Commonwealth* v. *Andrews*, 211 Penna. St. 110; *Goddard* v. *State*, 12 Conn. 448; *State* v. *Kennan*, 25 Wash. 621.

In this view of the law the sentence of the Justice of the Peace was properly affirmed by the District Court.

Latimer v. *Wilson* (1926) 103 N. J. L. 159. Latimer was convicted on a charge of operating a motor vehicle while under the influence of intoxicating liquor and sentenced to 30 days in jail. The case was appealed on the constitutional ground that the defendant was denied the right of a trial by jury. The maximum punishment that might have been imposed for

violation of the law was 6 months in the county jail.

The Court sustained the penalty of the Act and held that the defendant was not entitled to a trial by jury.

In *McGear* v. *Woodruff*, 22 N. J. Law 213, the court sustained the constitutionality of an ordinance punishing persons obstructing the highway by imprisonment not exceeding seven days.

In *State* v. *Glenn*, (1880), 54 Md. 572, the facts were that Margaret Glenn was tried before a justice of the peace acting as a police justice in the city of Baltimore, charged with being a habitually disorderly person and leading a dissolute and disorderly course of life. Upon trial she was convicted and sentenced to the Maryland House of Correction for a period of six months.

Petition for habeas corpus was filed upon the defendant commencing her term of imprisonment, which was granted by the lower court. The Court of Appeals of the State of Maryland reversed the decision of the lower court.

The opinion of the court (pp. 599, to 606, inc.) reviews the history of trial by summary procedure both in this country and in England. The provision of the State Constitution provided that in all criminal prosecutions one was entitled to a trial by an impartial jury. The opinion of the court states: (p. 600)

> In England, notwithstanding the provision in the Magna Charta of King John, Article 46, and in that of 9 Hen. 3, Ch. 29, which declares that no freeman shall be taken, imprisoned or condemned, 'but by lawful judgment of his peers, or by the law of the land', it has been the constant course of legislation in that kingdom, for centuries past, to confer summary juris-

> diction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses; and this jurisdiction has been largely increased and extended in modern times, as will be seen by reference to Burn's Justice, Tit. Conviction; Bacon's Justice Abr., Tit. of the Peace and Paley on Summary Convictions.

The court (p. 601) quotes with approval from 4 Blackistone Com. 280, as follows:

> Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts, and *corporal* penalties denounced by Acts of Parliament for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others * * *.

In referring to the approved practice of summary jurisdiction in England the court said: (p. 602)

> At present, in England, the various offenses falling under the heads of idle, vagrant, and disorderly persons, and made subject to the summary jurisdiction, are defined and classified, and the punishments prescribed by statute, 5, Geo. 4, Ch. 83, as amended by statutes 1 and 2 Vict. Ch. 38; 31 and 32 Vict. Ch. 52, and 32 and 33 Vict. Ch. 99; an analysis of which is given in 2 Broom and Had. Com. 476. The punishment prescribed in those Acts is imprisonment at hard labor. The exercise of summary jurisdiction, therefore, is not, in England at least, regarded as being in violation of the fundamental guarantees of the rights and liberties of the people; and the personal liberty of the subject at this day is as well and jealously

protected in England as in any other country, where the principles of Magna Charta and of the common law are enforced.

VI.

The offense of reckless driving in the District of Columbia, as defined in the Traffic Act, is a municipal offense notwithstanding the fact that the law was enacted by the Congress of the United States. Congress has properly treated reckless driving as a petty offense.

The offense of reckless driving was not created in a criminal statute but by the Traffic Act of 1925, which deals simply with local traffic conditions. The offense is a common one. In a city of scarcely more than five hundred thousand inhabitants there are almost seventeen hundred charges of reckless driving tried before this one court in a single year. (Report of the Commissioners of the District of Columbia, for year ended June 30, 1929, page 14.) And, as shown by the State cases herein cited, the maximum punishment for a violation of this portion of the act is relatively light. In view of these circumstances a charge of reckless driving may properly be tried without a jury.

Congress has exclusive jurisdiction over the District of Columbia. It may authorize the Commissioners of the District of Columbia to promulgate ordinances or it may enact by statute a regulation which is in the nature of a municipal ordinance as distinguished from an Act which makes the doing of a certain thing a serious offense. Section 932 of the Code of the District of Columbia provides:

> Conduct of Prosecutions, and so forth.—The attorney for the District of Columbia shall hereafter be known as the corporation counsel.

> Prosecutions for violations of all police or municipal ordinances or regulations *and for violations of all penal statutes in the nature of police or municipal regulations*, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the city solicitor (sic) or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia.

The Court of Appeals of the District of Columbia in the case of *United States* v. *Cella*, 37 App. D..C. 433, reversed the judgment of the Supreme Court of the District of Columbia which sustained a demurrer to an indictment charging the offense of operating and owning a bucket shop in the District of Columbia (Section 869b of the Code of the District of Columbia). Defendants contended the prosecution should be in the name of the District of Columbia. The Court speaking through the same justice that rendered the opinion in the case at bar said:

> We have said in the prior case that there can be no crimes against the District of Columbia, the District not being a sovereignty; that crimes committed here are crimes against the United States. *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 9. Congress, in the exercise of its plenary power, has prescribed the procedure to be followed in the prosecution of offenses in the District. It has ordained that prosecutions for violations of all police or municipal ordinances or regulations, and penal statutes "in the nature of police or municipal regulations," shall be in

the name of the District. It is at once apparent, therefore, that the point raised by appellees is purely technical in character, as no substantial right is involved.

Looking to the context, and having in mind the probable intent of Congress, what is the scope of the words "penal statutes in the nature of police or municipal regulations," as used in the statute under consideration? A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation. *Baldwin* v. *Philadelphia*, 99 Pa. 170; *Rutherford* v. *Swink*, 96 Tenn. 564, 35 S. W. 554. When, therefore, Congress required prosecutions for violations of statutes in the nature of police or municipal regulations to be in the name of the District of Columbia, it undoubtedly had in mind such local regulations as were peculiarly applicable to conditions here existing. It did not, we think, intend to require or permit prosecutions under general penal statutes to be in the name of the District of Columbia, even though the territorial scope of such statutes was restricted to the District. A statute making it an offense for a motor vehicle to exceed a certain limit of speed within the city limits would clearly be a penal statute in the nature of a police regulation. Such a statute would be designed to regulate the speed of motor vehicles in accordance with the requirements of local conditions. The bucket shop statute under consideration, however, is of a different character.

The Traffic Act deals exclusively with the District of Columbia and is a statute in the nature of a munici-

pal regulation. Congress was dealing solely with local conditions. It said that the operation of an automobile in a certain manner constituted reckless driving. There is nothing in the reports or debates prior to the enactment of the statute to indicate that Congress was attempting to revamp the common law offense of "fast" driving in a "crowded or populous" street. Because the offense of reckless driving today may have one or even more elements similar to a common law offense that fact does not thereby make it a common law offense.

Assuming, without conceding, that at the time of the adoption of the Constitution the charge of reckless driving was triable only by jury, it is submitted that in recent times the offense has been merely a petty one. In *Ex parte Wilson*, 114 U. S. 417, this Court said (p. 427):

> What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act of September 24, 1789, ch. 20, par. 9; 1 Stat. 77. But at the present day either stocks or whipping might be thought an infamous punishment.

This language was approved in *Mackin* v. *U. S.*, 117 U. S. 348.

At the present day all men and women travel much more rapidly than was possible in 1787. Doubtless there has been an accompanying change in the attitude of the public towards reckless driving and in the effect of conviction upon an offender's standing in the community. This change in public opinion may be an important consideration in determining whether the offense should now be regarded as a petty one. The fact that there are seventeen hundred arrests for reckless driving in the District of Columbia in a single year, shows not only the need for as expeditious a trial as is compatible with law and with justice, but that the offense is not being regarded as a major one at the present time.

This Court in the case of *United States* v. *Moreland*, 258 U. S. 433, considered and decided the question of what imprisonment amounts to infamous punishment. The dissenting opinion of Justice Brandeis, concurred in by Chief Justice Taft and Justice Holmes, in reviewing the history of criminal proceedings in the Colonial period, said (p. 445):

> Confinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period, at the time of the adoption of the Constitution and since, for offenses not deemed serious—that is, for delinquencies as distinguished from serious crimes. Thus by the Great Law of the Province of Pennsylvania of December 7, 1682, the penalty for clamorous scolding, railing or lying was three days' imprisonment in the house of correction at hard labor; for cursing, playing at cards or dice, and for the first offense of drunkenness, it was five. For stage plays, bull baiting and

> cock fighting, it was at least ten. And for dueling it was three months. The duty to establish such a house "for restraint, correction, labour and punishment" was imposed upon every county of Pennsylvania at the same time. A similar law had been enacted in Plymouth Colony in 1658; in Massachusetts Colony earlier; and like provision was made in other colonies. By the Law of New York of February 9, 1788, c. 31, confinement in the house of correction at hard labor was prescribed as the punishment for all disorderly persons. And those "who threaten to run away and leave their wives and children to the city or town" were classed as disorderly persons, with vagrants, beggars, idlers, fortune-tellers and common prostitutes. The period of imprisonment, limited ordinarily to sixty days or until the next general sessions of the peace, could be extended by the general sessions for a further period of six months. In the counties or cities in which there was no workhouse (bridewell) or house of correction, the jails were to be used and considered as such. A single institution often served as almshouse, insane asylum, workhouse, house of correction and jail. *And under all of these laws commitment to the workhouse at hard labor was made by a judge, justice of the peace, or magistrate, without presentment or indictment of a grand jury.* (Italics ours).

The Court of Appeals in its decision relied upon the case of *U. S.* v. *Hart*, 1 Pet. cc. 390. The offense charged against the defendant, who was a constable in the city of Philadelphia, was knowlingly and willfully retarding the passage of the mail. The defendant relied upon the fact that the mail coach was going at a fast rate of speed so as to endanger the lives and safety of the citizens; that it was passing very rapidly through

Market Street at the time it was stopped by the defendant. Some witnesses stated the speed to be as high as 8 or 9 miles an hour. The defendant justified his conduct upon an ordinance of the city which subjected every person to a fine who should drive at an immoderate rate of speed in the city so as to endanger the citizens thereof, or who should drive a carriage on runners without bells. It was contended by defendant's counsel that this ordinance offered complete justification to the constable; if not, that fast driving in a populous street in such a manner as to endanger the safety of the inhabitants, amounted to a breach of the peace at common law, in which case the constable is authorized without a warrant to arrest the party.

The court said:

> But, there is in truth no collision between this ordinance and the act of Congress on which this indictment is founded. If the mail carrier should violate the ordinance, the Act of Congress does not shelter him from the penalty imposed by the ordinance. But the ordinance does not authorize any officer to stop the mail, and consequently he cannot justify his having done it, under that ordinance. The defendant's counsel have then resorted to the common law, which authorizes a constable, without warrant, to prevent a breach of the peace; and it is contended, that for any person to drive through a populous city, at such a rate as to endanger the lives or the safety of the inhabitants, amounts to a breach of the peace.
>
> * * * As to the first question the Court is of opinion that driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offense at common

> law, and amounts to a breach of the peace. But, whether in the two cases stated in this indictment, the mail carrier so conducted himself as to come within this principle, is a question proper for the jury to decide. If they decide this fact affirmatively, then upon the principles of the common law, the constable was authorized without a warrant, to prevent the peace from being broken.
>
> (Verdict not guilty).

The court apparently misconceived the significance of the term "indictable offense." The driver of the mail coach was at most only guilty of a breach of the peace and such an offense was not, at common law or today, triable upon an indictment, but has consistently been punished summarily by a magistrate. The offense alleged to be committed by the driver of the mail coach was in the presence of the constable, the defendant Hart. He would be authorized to arrest without a warrant and the opinion states that this would be so by virtue of the authorization to prevent a breach of the peace. This Court in *Ex parte Wilson*, 114 U. S. 417, in discussing the point of the necessity of indictment for offenses stated:

> By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offence which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. *The Fifth Amendment, declaring in what cases a grand jury should be necessary,*

> *and in effect affirming the rule of the common law upon the same subject, substituting only, for capital crimes or felonies, "a capital or otherwise infamous crime," manifestly had in view that rule of the common law, rather than the rule on the very different question of the compentency of witnesses.* (Italics ours.)

It is clear from the foregoing that the utterance of this Court as quoted above conclusively demonstrates that a breach of the peace consisting of fast driving so as to endanger the lives and safety of the citizens was not an indictable offense at common law. The Court of Appeals seized the phrase "indictable offense at common law" used in the Hart case, supra, and concluded the offense of reckless driving defined in the Traffic Act was an "indictable offense" and therefore a "crime" as that term is understood in Article 3, Section 2, Clause 3, of the United States Constitution. By such process, it is deferentially submitted, the Court thereby erred.

The offense of fast driving over a crowded and populous street at such a rate or in such manner as to endanger the safety of the inhabitants, is quite different from the offense prohibited by the Traffic Act and known as reckless driving. The first can only be committed where the carriage or vehicle attains a speed which is designated *fast* and over a *crowded* or *populous* street. The offense of reckless driving may be committed although the operator of the vehicle is not proceeding *fast* and may be committed upon a street that is not *crowded* or *populous* and irrespective of whether the operation of the vehicle amounts to a breach of the peace or not.

CONCLUSION

It is submitted that the decision of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted:

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September 1930

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 96

DISTRICT OF COLUMBIA, PETITIONER,

v.

WILLIAM H. COLTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Leave of Court having been granted, Counsel for the District of Columbia set forth the British Statute referred to during the hearing of the case.

13 GEORGE III, CHAPTER 84
(Act of Parliament 1773)

> An Act to explain, amend and reduce into one Act of Parliament, the general laws now in being for regulating the Turnpike Roads in that part of Great Britain called England; and for other purposes.

Chapter 84 contains 86 sections, however only Section 40, set forth below, was called to the attention of the Court during the argument of the case.

"Section XL: And whereas many bad accidents happen, and great mischiefs are frequently done upon the streets and highways, being Turnpike Roads, by the negligence or wilful misbehavior of persons driving carriages thereon; be it therefore enacted, that if the driver of any cart, car, dray or wagon, shall ride upon any such carriage, in any street or highway, not having some other person on foot, or on horseback, to guide the same (such carriages as are conducted by some person holding the reins of the horse or horses drawing the same excepted); or if the driver of any carriage whatsoever, on any part of any street or highway, shall, by negligence or wilful misbehavior, cause any hurt or damage to any person or carriage passing . being upon such street or highway; or shall quit the high . and go on the other side of the hedge or fence inclosing the same; or wilfully be at such distance from su carriage, or in such a situation, while it shall be assing upon such highway, that he cannot have th irection and government of the horses or cattle drav ng the same; or shall, by negligence or wilful misbeh or, prevent, hinder or interrupt the free passage any other carriage, or of his Majesty's subjects, on said highway; or if the driver of any empty or u ded wagon, cart, or other carriage shall refuse or neg to turn aside and make way for any coach, chariot, haise, loaded wagon, cart, or other loaded carriage; or if any person shall drive, or act as the driver of any such coach, post chaise or other carriage, for hire, or wagon, wain or cart, not having the owner's name, as hereby required, painted thereon; or shall refuse to discover the true christian and surname of the owner of such respective carriage; every such driver so offending in any of the cases aforesaid, and

being convicted of any such offense, either by his own confession, the view of a justice of the peace, or by the oath of one or more credible witness or witnesses, before any justice of the peace of the limits where such offense shall be committed, shall, for every such offense, forfeit any sum not exceeding ten shillings, in case such driver shall not be the owner of such carriage; and in case the offender be the owner of such carriage, then any sum not exceeding twenty shillings; and in either of the said cases shall, in default of payment, be committed to the house of correction for any time not exceeding one month, unless such forfeiture shall be sooner paid; and every such driver offending in either of the said cases shall and may, by Authority of this Act, with or without any warrant, be apprehended by any person or persons who shall see such offense committed, and shall be immediately conveyed or delivered to a constable or other peace officer, in order to be conveyed before some justice of the peace, to be dealt with according to law; and if any such driver, in any of the cases aforesaid, shall refuse to discover his name, it shall and may be lawful for the justice of the peace before whom he shall be taken, or to whom any such complaint shall be made, to commit him to the house of correction for any time not exceeding three months, or to proceed against him for the penalty aforesaid, by a description of his person and the offense, and expressing in his proceedings, that he refused to discover his name."

Respectfully submitted,

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